Supreme Court, U.S.
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No. 00-1703

In The

Supreme Court of the United States

ROBIN LOVITT,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Is there any compelling reason to review the Virginia Supreme Court's decision, predicated on settled law, that evidence of unadjudicated criminal conduct was admissible in the sentencing phase to prove future dangerousness?

2. Is there any compelling reason to review the eleven other rulings of the Virginia Supreme Court which the petitioner refers to in summary fashion, including state law matters, discretionary trial court rulings, the sufficiency of the evidence and the constitutionality of the "future dangerousness" aggravating factor?

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STATEMENT OF THE CASE

I. Proceedings

Robin Lovitt was tried on September 20, 1999, by a jury in the Circuit Court of Arlington County, Virginia and found guilty of the November 18, 1998, capital murder of Carlton Dicks during the commission of robbery. The jury also found Lovitt guilty of robbery. In a separate sentencing hearing, the jury sentenced Lovitt to death for the capital murder and to life imprisonment for the robbery. The jury based the death sentence on the "future dangerousness" aggravating circumstance.

On March 1, 2000, the trial court held a post-verdict hearing at which it considered the probation officer's report, additional evidence and argument of counsel. The court imposed the sentences which had been fixed by the jury. On November 3, 2000, the Supreme Court of Virginia unanimously affirmed the convictions and sentences. *Lovitt v. Commonwealth*, 537 S.E.2d 866 (Va. 2000). On January 12, 2001, the Supreme Court of Virginia denied Lovitt's petition for rehearing. Lovitt filed his petition for a writ of certiorari in this Court on May 14, 2001.

II. Facts

The Supreme Court of Virginia found the facts regarding the guilt phase of trial to be as follows:

> The evidence showed that in the early morning hours of November 18, 1998, Clayton Dicks was stabbed six times in the chest and back while working during the overnight shift at Champion Billiards Hall (the pool hall) in Arlington County.

A few months before the killing, Lovitt worked as a cook at the pool hall on an evening shift that ended when Dicks arrived to begin the overnight shift. Amy Hudon, the manager at the pool hall, testified that about two months before Dicks was killed, she had trouble opening a cash register drawer near a pool table and asked Lovitt to help her open the drawer. Lovitt opened it by "wedging" a pair of scissors into the drawer's latch. About two months before the killing, Lovitt quit working at the pool hall.

On November 17, 1998, the day before the killing, Lovitt went to the Arlington home of his cousin and tried to sell him a television set. The same day, Lovitt spoke to an acquaintance in a failed attempt to find a job.

Later that night, Lovitt went to the pool hall between 8:00 and 10:00 p.m. and spoke with people he knew. When Lovitt asked some of them for money, each refused his request. Two of these people recalled that Lovitt wore a flannel shirt that night. The bartender that night, Thomas Schweiker, did not know Lovitt but remembered giving matches to a man leaning over the bar. Later, Schweiker noticed that a pitcher containing cash from cigarette sales was missing from beneath the bar where the man had been leaning. Schweiker testified that the man, an African-American in his middle or late twenties, had a stocky build and facial hair, and was wearing a plaid flannel shirt.

Dicks arrived at the pool hall between 1:30 and 2:00 a.m. The other employees present when Dicks arrived had left the pool hall by 3:00 a.m., leaving Dicks as the sole employee on the premises. The last four patrons in the pool hall

that morning left between 2:45 and 3:00 a.m. One of these patrons was Officer Dennis A. Holland of the United States Capitol Police, who was a long-time patron at the pool hall. Holland testified that he saw a man who looked "familiar" enter the pool hall as he and his friends were leaving. Holland described the man as being black, about five feet, ten or eleven inches tall, weighing between 185 and 190 pounds, and wearing a flannel shirt.

About 3:25 a.m., Jose N. Alvarado and Carlos Clavell entered the pool hall and saw two men arguing behind the bar. Alvarado testified that one man was shorter than the other, and that the shorter man repeatedly shoved the taller man, who was wearing an apron. Alvarado stated that he and Clavell watched as the shorter man stabbed the taller man six or seven times with a silver-colored weapon. Alvarado saw blood on the taller man's apron and watched as the taller man fell to the floor behind the bar. Clavell testified that he heard the taller man begging the shorter man to stop attacking him. Both Alvarado and Clavell saw the assailant repeatedly kick the man who had fallen to the floor.

Alvarado and Clavell immediately ran from the pool hall to a service station, where Alvarado telephoned the "911" emergency response number and reported what they had seen. Although Alvarado could not identify Lovitt as Dicks's assailant at the preliminary hearing held in this case, Alvarado testified at trial that he was about "80% certain" that Lovitt was the assailant.

When police and emergency medical personnel arrived at the pool hall in response to Alvarado's telephone call, they found Dicks lying on the floor behind the bar in a pool of blood. Dicks was alive but was unable to speak and was taken by helicopter to a nearby hospital. The multiple stab wounds prevented his heart from functioning, and he died while awaiting surgery.

Dicks had been stabbed six times, five times in the chest and once in the back. Four of these wounds were lethal. Dicks also suffered two areas of internal hemorrhage on both sides of his head, as well as external abrasions on both shoulders and on his left knee.

The police recovered from the pool hall a cash register that was lying on the floor near where Dicks was found. The register was broken into pieces, the cash drawer had been removed from the register and was missing, and a torn piece of a ten-dollar bill was found nearby. A pair of scissors with orange handles that was usually kept in a container on the bar was missing. A police canine unit found an orange-handled pair of scissors bearing blood lying open in the woods about 15 yards behind the pool hall.

Warren A. Grant, Lovitt's cousin, testified that Lovitt arrived at Grant's home in the early morning hours of November 18, 1998. Grant lived about a quarter of a mile from the pool hall in a residential area located on the "other-side" of the woods. Grant stated that Lovitt knocked on his door sometime between 1:30 and 3:00 a.m. Lovitt was wearing a plaid shirt and entered the house carrying what looked like a

large, square, gray metal box. After Lovitt unsuccessfully tried to open the locked box, Grant eventually opened it by using a screwdriver to "pop" some of the screws securing the box. Lovitt removed money from the opened cash register drawer and divided the cash between himself and Grant. Lovitt left the cash register drawer with Grant and instructed him to "get rid of [it]." A few days later, Grant began cutting the cash drawer into pieces with tin snips and put them in a bag.

Grant's girlfriend, Delores L. Harris, testified that she was in Grant's house that morning and watched Grant and Lovitt open the cash register drawer. She noticed that Lovitt looked "sweaty" and gave him a towel.

On November 20, 1998, Arlington Detective Noel E. Hanrahan obtained pieces of the cash register drawer from Grant. Four days later, Lovitt was arrested and charged with the present offenses. At that time, he was wearing a plaid shirt and a dark jacket, and he told the police that he had been wearing the same clothes for the past few days. When Officer Stephen Ferrone collected Lovitt's clothing at the jail, Ferrone asked a detective whether he needed to seize Lovitt's jacket. Ferrone testified that, upon hearing this question, Lovitt stated, "I wasn't wearing it when it happened."

Julian J. Mason, Jr., a forensic scientist employed by the Virginia Division of Forensic Science, qualified as an expert witness on the subject of tool mark identification. He testified that the cash register drawer Grant surrendered to the police had been removed from the broken cash register found on the floor of the pool hall.

Mason also stated that the pry marks on the cash register drawer were made by the scissors that were found in the woods behind the pool hall.

Lawrence Abrams, an identification technician for the Arlington County Police Department, testified that he was not able to obtain fingerprints from the handle of the scissors due to its irregularly-shaped surface. The only identifiable fingerprints obtained in relation to the present crimes were Grant's fingerprints that were obtained from the cash register drawer.

Carol Palmer, a forensic scientist employed by the Virginia Department of Forensic Science, qualified as an expert witness on DNA testing. Palmer extracted human DNA from two places on the scissors, on a blade near the tip and on a blade near the finger loops. She also extracted blood from three small circular areas on the left front side of Lovitt's jacket, but the DNA tests were inconclusive and Palmer was unable to determine whether the blood on the jacket was human. Palmer found no blood on the flannel shirt, black jeans, or shoes that Lovitt was wearing when he was arrested.

Palmer testified that she performed DNA testing using the "polymerase chain reaction," or PCR, technique on the DNA extracted from the scissors. The DNA extracted from the tip of the scissors displayed a DNA profile that matched the DNA profile of Dicks. The profile derived from this sample did not match the DNA profiles of either Lovitt or Grant, thus eliminating both as contributors of this DNA. Palmer stated that the chance of someone other

than Dicks contributing the DNA sample on the tip of the scissors was 1 in more than 5.5 billion.

The DNA extracted from the mid-section of the scissors also matched the DNA profile of Dicks. However, Palmer stated that this DNA evidence, unlike the DNA evidence from the tip of the scissors, did not exclude either Lovitt or Grant and, thus, was inconclusive as to them.

After Lovitt's arrest, he was incarcerated in the Arlington County Jail in the same unit as Casel Lucas. Lovitt and Lucas developed a friendship during the two months that they lived together in this unit. Lovitt first told Lucas that after leaving the bathroom at the pool hall on the night of the murder, Lovitt saw a Hispanic man stabbing Dicks. Lovitt told Lucas that, at that time, Lovitt saw the cash register drawer, grabbed it, and ran from the pool hall.

According to Lucas, Lovitt later stated that he knew Dicks and was aware that no one else would be in the pool hall late at night. Lovitt further related that he waited in the bathroom until everyone left the pool hall before coming out of the bathroom to attempt to open the cash register drawer. Dicks confronted Lovitt as he unsuccessfully attempted to open the cash drawer. Lovitt told Lucas that he had to kill Dicks because Dicks had recognized him. According to Lovitt, Dicks asked him, "Why [are] you doing this?" Lovitt admitted to Lucas that he stabbed Dicks several times and took the cash register drawer to his cousin's house where he and his cousin split the money before leaving to buy some drugs. Lovitt told Lucas that he discarded the murder weapon while en route to or from Grant's house, and that he changed his

> clothes at Grant's house because he had blood on his shirt and pants.

Lovitt, 537 S.E.2d at 870-73.

The Supreme Court of Virginia found the facts regarding the sentencing phase of trial to be as follows:

> During the penalty phase of the trial, the Commonwealth presented evidence of Lovitt's criminal record. In October 1975, when Lovitt was 11 years old, he was charged with assault and placed in protective supervision. Also as a juvenile, in August 1979, Lovitt was committed to the Beaumont Learning Center of the State Department of Corrections (Beaumont) based on adjudication of charges of breaking and entering and larceny. While at Beaumont, Lovitt was disciplined for fighting, assault, and possessing contraband items. After his release from Beaumont in 1980, Lovitt was convicted of grand larceny in 1981 and was sentenced to 12 months in jail.
>
> Between 1983 and 1985, Lovitt was convicted of petit larceny, grand larceny, breaking and entering, and distribution of marijuana. In 1986, Lovitt was convicted of attempted robbery and was sentenced to a term of imprisonment of from one to three years. After being released on parole in August 1987, Lovitt's parole was revoked in August 1988 based, in part, on additional arrests and his failure to pass certain drug tests. Lovitt later was convicted of statutory burglary and grand larceny. While incarcerated on these convictions and the parole violation, Lovitt was disciplined for damaging property and for fighting.

In September 1990, Lovitt again was released on parole. In early 1991, Lovitt was convicted of possession of cocaine, grand larceny, and burglary. While incarcerated on these charges, Lovitt was the subject of ten disciplinary actions for offenses including possession of contraband, disobeying direct orders, assault, possession of intoxicants, and manufacturing "shank handles." After being released on parole in October 1996, Lovitt was convicted in 1997 of possession of marijuana, petit larceny, unlawful entry, assault and battery, and destruction of property. Lovitt was on parole at the time of the present offenses.

In October 1998, Arlington County Police Officer Jerome A. Lee detained Lovitt in an apartment parking lot in Arlington. Lovitt had parked his car behind the apartments, appeared to be very nervous, and consented to a search of his vehicle. Lee found a long kitchen knife on the floor of the passenger area and a soda can used to smoke crack cocaine in the rear floor area of the vehicle.

Lovitt presented testimony from his sister, Amanda Jones, who testified that Lovitt was the oldest of 12 children and that he helped take care of his younger siblings, although not "gladly." Lovitt also presented testimony from four deputies employed by the Arlington County Sheriff's Office, who stated that Lovitt had not presented any disciplinary problems while being held in jail on the present charges.

Lovitt, 537 S.E.2d at 873.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Summary

Lovitt's petition confuses two legal principles: the *burden of proof* required for guilt and the *admissibility of evidence* at a capital sentencing hearing. This case presents no question of whether the State must prove the elements of an offense to establish a defendant's guilt beyond a reasonable doubt but rather whether the due process standard of *proof of guilt* can be imported into the arena of *admissibility* of evidence in a sentencing proceeding and specifically applied as some sort of threshold requirement as each fact or piece of evidence is admitted. By asking this Court to require that state trial courts in capital sentencing proceedings apply a "burden of proof" standard to *each fact* or piece of evidence before it can be admitted, Lovitt essentially is asking that the State meet *multiple* burdens of proof, first for each fact or piece of evidence and then again for the ultimate fact at issue, *i.e.*, the aggravating factor and/or recommended sentence. Nothing in this Court's precedents, however, supports such an extraordinary requirement regarding the admissibility of evidence and in fact this Court has made clear that the Constitution requires no "standard of proof" for *admissibility*. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986). Lovitt's "conflict among the States and federal circuits" argument attempts to further confuse these two distinct trial processes and does not demonstrate any unsettled question regarding the admissibility of evidence. Lovitt's characterization of the evidentiary procedures in Virginia, the unadjudicated evidence in his

case and its possible effect, are incorrect in any event, and cannot support a grant of the writ of certiorari.

I. The Virginia Supreme Court's Rejection Of Lovitt's Challenge To The Admission Of Evidence Of Unadjudicated Conduct Presents No Compelling Reason To Grant Certiorari.

In the appeal below, Lovitt made the summary, boiler-plate argument that "the Virginia statute violates the Eighth and Fourteenth Amendments' [sic] heightened reliability requirement for capital sentencing because it allows the sentencer to prove the statutory aggravating factor of future dangerousness by evidence of unadjudicated criminal conduct. It fails to satisfy any standard of proof before such conduct may be used." (Opening Br. of Def. at 25).[1] The Virginia Supreme Court rejected the claim in the "Issues Previously Decided" section of its opinion, citing to three previous opinions where the court had rejected the same claim. *Lovitt*, 537 S.E.2d at 874.

Lovitt claims that certiorari should be granted because there allegedly is a conflict among the States and federal circuits over the issue and because Virginia takes the "extreme position that such evidence is *per se* admissible under the federal constitution because the jury should have before it *'all possible relevant information* about the

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[1] In addition to this conclusory claim, Lovitt made one further reference to the issue in his reply brief, citing a law review article for the proposition that other States prohibit the use of unadjudicated conduct. (Reply Br. of Def. at 7).

individual defendant whose fate it must determine' " (Pet. at 9, emphases in original). He further alleges that, in his sentencing hearing, the jury was exposed to a plethora of unadjudicated conduct evidence, that this was unfair to him and violated the Due Process Clause of the Fourteenth Amendment. Lovitt's argument is both factually and legally flawed for several reasons. It certainly presents no matter which compels a grant of certiorari. *See* Sup. Ct. R. 10 (certiorari granted only for "compelling reasons").

A. The facts are not as Lovitt represents.

Lovitt misstates the record when he says that the unadjudicated evidence included the records submitted by the Commonwealth which showed that he had engaged in various assaultive behaviors during his years of incarceration as a juvenile and adult. (Pet. at 6). Those records hardly can be classified as "unadjudicated:" they are, rather, records of institutional due process hearings and findings made of punishable offenses. (Pet. at 6: VSC App. 2017-29, 2031-33) As the prosecutor accurately represented to the trial judge without objection, "these are documents that were – we took out all the opinion documents. The documents are from due process hearings that were had for infractions, serious incidents." (VSC App. 1658). *See Wolff v. McDonnell*, 418 U.S. 539, 564-65 (1974) (notice and opportunity to be heard in proceedings involving institutional offenses).

What Lovitt is left with to complain about are the unchallenged eyewitness accounts of law enforcement officers that (1) in 1998, an officer saw a knife in Lovitt's

car during a traffic stop, (2) in 1997, an officer found a razor in Lovitt's pants during an arrest, (3) in 1990, Lovitt tested positive for cocaine while on parole and (4) in 1998, Lovitt refused to go to substance abuse counseling at his parole supervisor's direction. Lovitt fails to articulate how any standard of proof requirement could have been violated by the admission of this evidence.[2] Obviously, even under Lovitt's proposed "beyond a reasonable doubt" standard, such was met for these facts.[3]

Lovitt also mischaracterizes the law governing admission of evidence in Virginia. According to Lovitt, because evidence of unadjudicated conduct is "per se" admissible, it comes in without any "shield" against "unreliable or unfairly prejudicial evidence" and "a defendant must suddenly defend himself against numerous different charges." (Pet. at 17-18). Of course this is not the case. In Virginia, evidence is admissible only if it is relevant and the test for relevancy is whether "the legitimate probative value outweighs the incidental prejudice to the accused." *Hawks v. Commonwealth*, 321 S.E.2d 650, 652 (Va. 1984). Moreover, in all Virginia capital

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[2] Lovitt also completely ignores the mammoth number of criminal records presented which showed that over the course of many years he had been found guilty of and punished for many violent crimes, including larcenies, burglaries, drug offenses, assaults and attempted robbery. (VSC App. 1936-2016). This extensive, unchallenged "*adjudicated* conduct" evidence simply renders *any* argument Lovitt has regarding the admission of *un*adjudicated conduct evidence harmless beyond any reasonable doubt.

[3] The same can be said for the records which showed that Lovitt had been found to have committed, and punished for committing, various serious institutional infractions.

murder trials, upon motion by the defendant, the Commonwealth must give notice of its intention to use evidence of unadjudicated conduct, including a description of the conduct and the time and place it is alleged to have occurred. Va. Code § 19.2-264.3:2. Lovitt made such a motion and the Commonwealth complied with the statutory mandate. Other matters aside, Lovitt certainly cannot complain about having "suddenly" to defend himself against *any* evidence.[4]

B. The issue has been decided by this Court.

Whether framed as a question of admissibility *vel non* or one of admissibility with a standard of proof, the issue of whether a sentencer may consider evidence of a defendant's prior misconduct which has not previously been formally adjudicated is not new or even open. In *Williams v. New York*, 337 U.S. 241 (1949), this Court held that the Constitution allows a sentencer in a capital case to consider evidence of unadjudicated conduct. Lovitt's only argument around this controlling precedent is that *Williams* allegedly was called into question by *Gardner v. Florida*, 430 U.S. 349 (1977). But *Gardner* did not overrule

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[4] Lovitt says that certiorari should be granted in his case in part because the Court granted certiorari in *Gray v. Netherland*, 518 U.S. 152 (1996), but *Gray* does not help Lovitt. The issue in *Gray* was whether the Constitution required notice of the use of unadjudicated acts where it was uncontested that the prosecutor had not given the required notice before presenting extensive evidence of other murders. There was no question raised or considered in *Gray* concerning the admissibility *vel non* of such evidence; indeed, it is implicit in *Gray* that the evidence would be admissible if the alleged notice requirement were met.

or question the validity of *Williams*; rather, it held *Williams* not applicable because the evidence in *Gardner* had been kept confidential even from the defendant. *Gardner*, 430 U.S. at 356-57.

Lovitt's argument that *Williams* implicitly was overruled, and his suggestion that the precedent of *Williams* does not measure up to the more recent "heightened standard of reliability" requirement for capital cases, are belied by this Court's consistent reliance on *Williams* after *Gardner*. For example, in *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 635 (1997), *Witte v. United States*, 515 U.S. 389, 397 (1995), and *Nichols v. United States*, 511 U.S. 738, 747 (1994), the Court referenced *Williams* for the principle that evidence of unadjudicated crimes is appropriate to consider in sentencing. In *Schlup v. Delo*, 513 U.S. 298, 326 (1995), a capital case, the Court cited *Williams* for the principle that there is "reduced procedural protection" in the sentencing phase. *See also Dawson v. Delaware*, 503 U.S. 159, 163 (1992); *Payne v. Tennessee*, 501 U.S. 808, 857 (1991) (both citing *Williams*). Of course, in *Jurek v. Texas*, 428 U.S. 262, 276 (1976), the Court made clear that "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine" and in *Tuilaepa v. California*, 512 U.S. 967, 976-77 (1994), the Court specifically upheld against constitutional challenge the use of an aggravating factor requiring the sentencer to consider the defendant's violent "criminal activity," including unadjudicated conduct. Thus, there can be no doubt that the holding in *Williams* remains good law and obviates any need for a grant of certiorari to redetermine the same issue.

In *McMillan v. Pennsylvania*, the petitioners argued that before unadjudicated acts could be considered by the sentencer, they must be proven by at least clear and convincing evidence. The Court held as follows:

> petitioners do not and could not claim that a sentencing court may never rely on a particular fact in passing sentence without finding that fact by "clear and convincing evidence." Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. *See Williams* . . . . We see nothing in Pennsylvania's scheme that would warrant constitutionalizing burdens of proof at sentencing.

477 U.S. at 91. The Court went on to observe that "we have consistently approved sentencing schemes that mandate consideration of facts related to the crime, *e.g.*, *Profitt v. Florida*, 428 U.S. 242 (1976), without suggesting that those facts must be proved beyond a reasonable doubt." *Id.* at 92.

The reason for this rule is quite simple: "criminal sentencing takes place only after a defendant has been adjudged guilty beyond a reasonable doubt." *McMillan*, 477 U.S. at 92 n.8. Sentencing involves the quite different concern of what punishment is appropriate for a crime which already has been proven beyond a reasonable doubt and requires the sentencer to "exercise a wide discretion in the sources and types of evidence" it will consider. *Williams*, 337 U.S. at 246; *Jurek*, 428 U.S. at 276 ("all possible relevant information"). Given this consistent precedent holding that the Constitution does not

require burdens of proof for particular evidence presented at a criminal sentencing, there is no call for a grant of certiorari on the matter.

Indeed, given this Court's holdings discussed above, Lovitt's "conflict" argument does not bear much discussion. He contends that state courts in Washington, Indiana, Alabama and Tennessee prohibit the use of unadjudicated conduct evidence altogether, but admits that Tennessee bases its prohibitive rule on *state* law. (Pet. at 11). Of the three remaining States, only one – Indiana – even mentions *Williams v. New York* in its decision prohibiting unadjudicated conduct evidence. The others certainly cannot represent any kind of "conflict" worthy of certiorari review when they do not even recognize this Court's controlling precedent on the matter. And the decision from Indiana – *State v. McCormick*, 397 N.E.2d 276 (Ind. 1979) – cannot be considered as a true "conflict" for at least two reasons. First, like petitioner, the court in *McCormick* misread *Gardner* as somehow overruling *Williams*, a conclusion, as discussed above, shown to be wholly inaccurate by *Gardner* itself. Second, the decision in *McCormick* appears to have been driven largely by the fact that, under *state* law, the statutory aggravating factor of an unadjudicated murder was required to be proven beyond a reasonable doubt and the Indiana court was unwilling to allow such "trials within trials" to occur. 397 N.E.2d at 278. This 1979 case simply does not present a conflict on any constitutional issue that compels a grant of certiorari.

Lovitt also discusses cases from three other States – Utah, California and Louisiana – which he says show a conflict with Virginia on the question of standard of

proof, but none of those cases even mentions *McMillan v. Pennsylvania*. (Pet. at 12-13). Moreover, they, like *McCormick*, turn mostly on the statutory scheme of each particular State: aggravating factors must be proven beyond a reasonable doubt; unadjudicated conduct is an aggravating factor; thus, the unadjudicated conduct must be proven beyond a reasonable doubt. On that point of logic, there is no conflict. Virginia also requires proof of aggravating factors beyond a reasonable doubt. *See* Va. Code § 19.2-264.4(C). Virginia, however, only allows two aggravating factors to be considered: future dangerousness and vileness. *See id.*[5] Virginia law does not require that each discrete piece of evidence admitted *to prove* an aggravating factor must *itself* be established by proof beyond a reasonable doubt. *See Walker v. Commonwealth*, 515 S.E.2d 565, 571-72 (Va. 1999) (relying on *McMillan*), *cert. denied*, 528 U.S. 1125 (2000). Lovitt shows no conflict with this undeniably constitutional practice.

Finally, Lovitt attempts to show a conflict among the federal courts of appeal on the standard of proof issue by arguing that because the Ninth Circuit has said that evidence of unadjudicated conduct must have "some minimal indicium of reliability beyond mere allegation," then that Circuit imposes a "standard of proof" that Virginia does not. (Pet. at 13). This argument is completely frivolous: "indicia of reliability" is an *admissibility* concern, not a "burden of proof" standard, and Virginia requires that evidence of unadjudicated conduct, like all evidence, be

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[5] Unadjudicated conduct is not an aggravating factor in Virginia. Evidence of unadjudicated conduct is admissible to prove the aggravating factor of future dangerousness.

both relevant and reliable for admission into evidence. *See Beaver v. Commonwealth*, 352 S.E.2d 342, 346-47 (Va. 1987), *cert. denied*, 483 U.S. 1033 (1987). Lovitt shows no conflict between Virginia and any federal circuit.

In the final analysis, all that Lovitt has shown is that some States have elected to prohibit the use of certain evidence in capital sentencing hearings and some have elected to specify as aggravating factors certain unadjudicated conduct by the defendant which must be proven beyond a reasonable doubt or some other standard of proof. States have the discretion to do so because,

> it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

McMillan, 477 U.S. at 85 (citations omitted). Virginia's statutory sentencing scheme, including the use of unadjudicated conduct evidence to prove the aggravating factor of future dangerousness, is authorized by the Due Process Clause as enunciated in *Williams* and *McMillan*. Lovitt presents no compelling reason why this Court should grant certiorari to revisit this settled law.

II. Lovitt's "Additional Errors" Argument Does Not Merit Review.

Lovitt argues in conclusory fashion that the Virginia Supreme Court made *eleven* other "errors," all of which merit a grant of certiorari. Lovitt, however, fails to identify a single issue that compels an exercise of the Court's extraordinary review power.

First "Error"

Lovitt first complains that the Virginia Supreme Court failed to conduct a proper "proportionality" review of his sentence pursuant to Virginia Code § 17.1-313(E). According to Lovitt, there never has been another death penalty case in Virginia where the murderer found the murder weapon at the scene of the robbery. This Court, however, may not grant certiorari to review this issue because it involves no federal issue. *See Pulley v. Harris*, 465 U.S. 37, 46 (1984) (proportionality review not required by the Constitution); Sup. Ct. R. 10. Moreover, as seen from the Virginia Supreme Court's opinion, the court undeniably conducted the sentence review required by state law. *Lovitt*, 537 S.E.2d at 880-81.[6]

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[6] Lovitt's assertion that there was no evidence of his intention to confront a victim, arm himself or use a weapon, is ludicrous. Lovitt knew the pool hall and where the money, scissors and manager were when he planned his robbery and planned to leave no witnesses. At least one other Virginia death penalty case involved the unimportant detail that the murderer picked up his weapon at the scene of the robbery. *See Correll v. Commonwealth*, 352 S.E.2d 352, 354 (Va.), *cert. denied*, 482 U.S. 931 (1987).

Second "Error"

Lovitt next complains that the Virginia Supreme Court erred because it did not find the trial court had abused its discretion by admitting evidence showing that Lovitt failed to show up for an appointment with his probation officer *five hours after the murder* or for an unrelated court appearance the *morning after the murder.* These evidentiary rulings do not involve any federal issue and thus may not support a grant of certiorari. *See Duncan v. Henry,* 513 U.S. 364, 366 (1995); Sup. Ct. R. 10. Moreover, as the court below found, the highly probative nature of this evidence of flight after a crime certainly outweighed any incidental, potential prejudicial effect. *Lovitt,* 537 S.E.2d at 876-77.

Third "Error"

Lovitt's next complaint presents no issue worthy of review: the decision to retain a juror who expressed emotion about the unrelated killings of fellow students ten years earlier, but who stated without reservation that she would not let that experience affect her duty to remain unbiased. The Virginia Supreme Court's unremarkable rejection of the claim, based on the discretion traditionally given to trial judges who see and hear the jurors, certainly presents no unsettled issue of law to be resolved by this Court. *See Lovitt,* 537 S.E.2d at 875.

Fourth "Error"

Lovitt further argues that the state court erred when it procedurally barred an assignment of error relating to a trial court ruling allowing testimony on reputation for truth and veracity. *See Lovitt,* 537 S.E.2d at 876. This issue without question involves only the application of state law; it involves no federal issue and thus may not support a grant of certiorari. *See* Sup. Ct. R. 10.

Fifth "Error"

Lovitt's fifth complaint is that the Virginia Supreme Court erred when it did not allow a sentencing phase jury instruction that the defendant would "die in prison" if given a life sentence. The court below did not allow such an instruction because it is not an accurate statement of Virginia law, *viz.*, prisoners may receive executive clemency. *Lovitt,* 537 S.E.2d at 878. Lovitt's jury was given the no-parole instruction required by *Simmons v. South Carolina,* 512 U.S. 154 (1994). He was entitled to no more.

Sixth "Error"

Lovitt's "insufficient evidence" complaint is frivolous. Under *Jackson v. Virginia,* 443 U.S. 307, 319 (1979), there can be no question but that the evidence was sufficient. *See Lovitt,* 537 S.E.2d at 877.

Seventh "Error"

His next complaint – that the Virginia Supreme Court procedurally barred a claim that his counsel should have been allowed to testify at trial allegedly to impeach a

Commonwealth's expert regarding a pretrial interview – clearly presents no federal issue. *See Lovitt*, 537 S.E.2d at 878 (applying Va. Sup. Ct. R. 5:25 requiring contemporaneous objection); U.S. Sup. Ct. R. 10.

Eighth "Error"

In his eighth complaint, Lovitt states in conclusory terms that the future dangerousness factor is unconstitutionally "vague" on its face and as applied and "the unadorned statutory terms are unconstitutionally vague." (Pet. at 26). Lovitt does not explain why he believes the factor is "vague" or what "terms" are "vague." These unexplained statements hardly show a compelling reason to grant certiorari. The Virginia Supreme Court's rejection of the claims – *Lovitt*, 537 S.E.2d at 874 – certainly involves no open question of law to be resolved. *See California v. Ramos*, 463 U.S. 992, 1002-03 (1983) (future dangerousness appropriate consideration at sentencing); *Jurek*, 428 U.S. at 275 (same).

Ninth "Error"

Lovitt next claims that the Virginia Supreme Court erred because it rejected his argument that his sentence was influenced by passion under Virginia Code § 17.1-313(C), based on the alleged fact that the victim's family sat near the jury during the trial. The Virginia Supreme Court's "arbitrariness" review of the sentence, however, is not required by the Constitution and thus may not support a grant of certiorari. *See Pulley v. Harris*. Moreover, as the court below noted, there was nothing in the record to support any finding of passion or prejudice,

much less any indication that the jury even knew who was sitting where in the courtroom. *Lovitt*, 537 S.E.2d at 879.

Tenth and Eleventh "Errors"

Lovitt's last two contentions require little comment. He complains that the Virginia Supreme Court rejected his arguments that he was entitled to individually question his prospective jurors and to receive more peremptory challenges than allowed by Virginia law. These issues, however, do not involve any federal issue. *See Mu'Min v. Virginia*, 500 U.S. 415, 430 (1991) (no constitutional right to individual voir dire); *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) (no constitutional right to any peremptory challenges). The Virginia Supreme Court's rulings – *Lovitt*, 537 S.E.2d at 874 – do not, therefore, compel a grant of certiorari. *See* Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Commonwealth of Virginia,
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